

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 15, 2008

MONIQUE D. SMITH v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2006-A-870 Cheryl Blackburn, Judge

No. M2007-02644-CCA-R3-PC - Filed March 4, 2009

Petitioner, Monique D. Smith, pled guilty in the Davidson County Criminal Court to possession of .5 grams or more of cocaine for resale in exchange for a thirteen year sentence as a Range II, multiple offender. The judgment specified that the jail fees were waived and that the sentence was to run concurrently with Petitioner's sentence in another case. Petitioner subsequently sought post-conviction relief on the basis that his guilty plea was unknowingly and involuntarily entered; he was denied effective assistance of counsel; the trial court failed to fully explain the plea agreement; he was illegally seized and arrested; and his conviction was based on constitutionally insufficient evidence. The post-conviction court denied relief. Petitioner appeals, arguing that the trial court improperly denied post-conviction relief. We determine that Petitioner failed to demonstrate by clear and convincing evidence that trial counsel was ineffective or that his guilty plea was involuntary. We therefore, affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

J. Chase Gober, Nashville, Tennessee, for the appellant, Monique D. Smith..

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, District Attorney General, and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the time of his arrest in January 2006 for the conviction at issue herein, Petitioner was serving seven years on Community Corrections as the result of a guilty plea from April 2005 in case number 2005-A-526. In 2005, Petitioner pled guilty to possession with intent to sell over twenty-six grams of cocaine. As a result of his January 2006 arrest, Petitioner was indicted by the Davidson

County Grand Jury in March of 2006 for possession of more than .5 grams of cocaine with the intent to sell, criminal impersonation, and criminal trespass. Petitioner pled guilty to possession of cocaine for resale on August 24, 2006.

The facts underlying Petitioner's arrest and subsequent indictment were relayed to the trial court by Metropolitan Nashville Police Detective Joel Goodwin at Petitioner's community corrections violation and sentencing hearing. Detective Goodwin informed the court that a confidential informant reported witnessing Petitioner walk from the Gold Star Market to another market at the corner of Murfreesboro Road and Millwood Drive with between one-eighth and one-quarter of an ounce of crack cocaine. Officers approached Petitioner shortly thereafter while he was standing near a dumpster at the back of the market. Petitioner moved away from the dumpster leaving a Jack in the Box hamburger wrapper that contained about 5 grams of crack cocaine. Petitioner was arrested at that time.

During the arrest, officers removed \$500 cash and two cell phones from Petitioner's person. However, none of the officers saw the drugs or wrapper in Petitioner's hands. Petitioner disputed Detective Goodwin's version of the events. Petitioner claimed that after he was placed on community corrections in August of 2005, he was arrested in November on drug charges that were eventually dismissed. Petitioner admitted that he never told his probation officer about his arrest. Petitioner remembered attending all of his probation meetings until December.

At the conclusion of the hearing, the trial court sentenced Petitioner to eleven years in the custody of the Department of Correction as a Range I, standard offender. Further, the trial court awarded credit for time served and "street time" through the date of the community corrections violation warrant.

In August of 2006, only four months after the community corrections violation warrant, Petitioner pled guilty in case number 2006-A-870 to one count of possession of more than .5 grams of cocaine for resale. At the plea hearing, Petitioner acknowledged that the facts supported the conviction. Further, Petitioner testified that he had an eleventh-grade education and that he had discussed the plea with trial counsel prior to the entry of the plea. Petitioner stated that he understood that he was willingly entering into an agreement to serve thirteen years as a Range II offender that would run concurrently with his sentence in case number 2005-A-526. Petitioner also stated that he had thoroughly discussed the plea with counsel, had no questions about the agreement, and was satisfied with counsel's representation. The trial court reviewed the charges and applicable ranges of punishment with Petitioner prior to the entry of the plea.

In October of 2006, Petitioner filed a pro se petition for post-conviction relief in which he challenged the constitutionality of his arrest; the sufficiency of the evidence; the voluntary nature of his plea; the trial court's explanation of the plea agreement and the effectiveness of his counsel at the plea hearing. After counsel was appointed, an amended petition was filed that alleged that ineffective assistance of counsel rendered Petitioner's plea involuntary. Specifically, Petitioner

alleged that trial counsel failed to adequately explain the plea agreement to Petitioner and failed to fully investigate the “facts surrounding the petitioner’s claim.”

The post-conviction court held a hearing on the petition for post-conviction relief. During the hearing, Petitioner testified that he felt “rushed” to take the State’s offer of thirteen years. Petitioner acknowledged that he rejected the State’s first plea offer and responded to the State that he would be willing to take thirteen.

Petitioner maintained that trial counsel refused to interview favorable witnesses and that trial counsel did not disclose that the time served as a result of his prior conviction from April of 2005 would not count toward the thirteen-year sentence that Petitioner would receive as a result of the plea agreement. Despite Petitioner’s complaints about trial counsel’s performance, Petitioner acknowledged that trial counsel presented two witnesses on his behalf at the hearing on the violation of community corrections. Petitioner did not specifically name any other witnesses that trial counsel failed to interview or call on his behalf.

Trial counsel testified that he was able to utilize the hearing on the community corrections violation as a discovery tool. In other words, trial counsel cross-examined the State’s witnesses and was able to divulge what evidence the State would put on if the case went to trial. Trial counsel decided as a result of the community corrections violation hearing that there was no basis for a motion to suppress.

Trial counsel recalled that the State presented three plea offers to Petitioner. The final offer was for a thirteen-year sentence to run concurrently with Petitioner’s sentence in case number 2005-A-526.

Trial counsel could not specifically recall if he had received a discovery request from Petitioner. Trial counsel described his general practice in regard to discovery. Generally, if requested by a defendant, trial counsel brought copies of discovery documents to a meeting with the defendant. In the absence of a request, trial counsel would not forward the discovery responses.

Trial counsel recalled meeting with Petitioner on several occasions and described one of the meetings as “one of the longest discussions” he had ever had with a defendant. Trial counsel testified that he explained Petitioner’s potential exposure to a twelve- to twenty-year sentence to run consecutively to his current eleven-year sentence. Trial counsel felt that Petitioner “would be a fool” not to take the State’s offer.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. In a written order, the post-conviction court accredited trial counsel’s testimony concerning his advice to Petitioner prior to the plea. Further, the post-conviction court found that even if counsel had not properly explained the consequences of the plea agreement, the trial court did so during the plea colloquy. The post-conviction court concluded that Petitioner failed to “demonstrate by clear and convincing evidence that trial counsel was ineffective or that he was prejudiced by counsel’s alleged deficient performance.” The post-conviction court noted that Petitioner was the one who

initially sought the offer that he ultimately accepted. As a result, the post-conviction court denied relief and dismissed Petitioner's case.

On appeal, Petitioner argues that the post-conviction court erred by determining that the guilty plea was knowing and voluntary and that counsel was effective.

Analysis
Post-Conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Ineffective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997).

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, Petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, Petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the State standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. *Pettus*, 986 S.W.2d at 542.

A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S.W.2d at 904.

The post-conviction court herein found that Petitioner did not prove his allegations by clear and convincing evidence. Petitioner argues that his counsel failed to inform him as to the nature and consequences of his guilty plea. However, Petitioner's guilty plea colloquy, which is included in the record, demonstrates that he agreed that he understood the plea agreement and that the trial court again explained both the charges and the corresponding sentences. During the plea colloquy, Petitioner admitted that he was satisfied with trial counsel's representation and that he had not been coerced into pleading guilty. Trial counsel testified that he reviewed the plea agreement with

Petitioner prior to the hearing. Petitioner did not present any proof other than his own testimony at the post-conviction hearing to corroborate his claims regarding the plea.

Petitioner also argues that trial counsel did not adequately investigate the case. However, this assertion is not borne out by the record. Trial counsel testified that he utilized the hearing on the community corrections violation as discovery. Trial counsel even had the opportunity to cross-examine the police officers responsible for Petitioner's arrest prior to the plea hearing. Further, trial counsel presented witnesses that testified on Petitioner's behalf. This issue is without merit.

Petitioner did not prove any of his allegations by clear and convincing evidence. Petitioner has not proven that services rendered by his counsel were insufficient. He has likewise not proven that he would have gone to trial instead of pleading guilty, as required for him to be successful on his petition. The record amply demonstrates that Petitioner received the effective assistance of counsel, and that his guilty plea was knowingly and voluntarily entered.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE